In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 6

CHARLES W. BAKER, ET AL.,
Appellants,

VERSUS

JOE C. CARR, ET AL.,
Appellees.

J. HOWARD EDMONDSON, Governor of Oklahoma,
Amicus Curiae.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF J. HOWARD EDMONDSON, GOVERNOR OF THE STATE OF OKLAHOMA, AS AMICUS CURIAE

Applicant and Attorney Pro Se,
J. HOWARD EDMONDSON,
Governor of Oklahoma,
State Capitol,
Oklahoma City, Oklahoma;

NORMAN E. REYNOLDS, JR.,
1101 Republic Building,
Oklahoma City 2, Oklahoma,
Attorney for Amicus Curiae.

September, 1961.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

J. Howard Edmondson, Governor of Oklahoma and attorney *pro se*, hereby respectfully moves that this Court permit him to file a brief in this case *amicus curiae* pursuant to paragraph one of Rule 42 of the Rules of this Court. Numerical paragraph four of Rule 42 may be indirectly applicable.

The grounds for this motion are as follows:

Applicant was elected Governor of the State of Oklahoma by a substantial majority with reapportionment of the State Legislature as one of the principal points in his

platform; that he speaks for a substantial majority of the citizens of the State of Oklahoma who are not adequately and fairly represented in the State Legislature and who consequently are being discriminated against as a result of the existing malapportionment; that the rights of said citizens and of Appplicant will be affected and determined by any decision of this Court in the above named action; that this petition is based upon the ground of the necessity of informing the Court of facts and situations which may have escaped its consideration and to remind the Court of legal matters which may not be brought to its attention, and such other grounds as are more fully set forth in the brief attached hereto.

The Appellants have consented to the filing of a brief *amicus curiae* by this Applicant, but the Appellees hav refused consent.

WHEREFORE, Applicant respectfully prays that he be accorded permission to file a brief *amicus curiae* in order to present arguments and viewpoints on the matters involved in the case which the parties themselves may not present, said brief accompanies this motion.

Respectfully submitted,

Applicant and Attorney Pro Se,
J. HOWARD EDMONDSON,
Governor of Oklahoma,
State Capitol,
Oklahoma City, Oklahoma;

NORMAN E. REYNOLDS, JR.,
1101 Republic Building,
Oklahoma City 2, Oklahoma,
Attorney for Amicus Curiae.

Dated September 5, 1961.

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To The Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Comes now J. Howard Edmondson, Governor of the State of Oklahoma, and respectfully submits that he speaks for a class which consists of in excess of seventy per cent of the citizens of the State of Oklahoma who are under represented in the State Legislature in varying degrees. Prior to the last legislative session certain voters in the State of Oklahoma had a vote with a strength in excess of thirty-three times that of other voters in the nomination and election of State Senator. As a result of most recent

unconstitutional Apportionment Act the disparity from one county to another is fourteen to one in selecting a State Representative.

Applicant was elected Governor of the State of Oklahoma in 1958 on a program of which one of the principal planks was reapportionment of the Legislature. The margin of victory was the greatest in the history of the State. Subsequent thereto Applicant requested the Legislature to reapportion according to the Constitution or in the alternative to submit a reasonable reapportionment measure to the people. This failed, in 1959 and again in 1961 although the 1961 Legislature did reapportion both the Senate and the House ignoring the constitutional mandate but granting some change which, if allowed to stand by the courts where it is now under attack, will afford negligible relief to the more populous counties.

As Governor of the State of Oklahoma Applicant has observed the operation of the lawmaking branch of government and the effect thereon of the malapportionment that exists and has concluded that by various and devious methods the legislation resulting has discriminated against the under-represented areas to the extent that urban needs are critical and state needs of a general nature have been allowed to suffer by the apparent concern for certain rural needs.

Applicant further submits that there appears to be no relief from this situation other than which may be afforded by the United States Supreme Court since the Legislature has failed to act according to the Constitution. The initiative procedure has become hopelessly bogged

down as is more fully detailed hereafter. The United States District Court and the Oklahoma Supreme Court have failed to afford relief heretofore.

MALAPPORTIONMENT RESULTS IN DISCRIMINATION AND THREATENS CLEAR AND IMMINENT IRREPARABLE INJURY

Democracy is engaged in mortal combat throughout the world with atheistic communism, consequently the deterioration of representative government so widespread in the legislatures of our sovereign states must be halted. Whereas, some 10 per cent of our people are directly affected by segregation, over 70 per cent of Oklahomans are being defrauded of their equal ballot. This figure is apparently similar to the condition in Tennessee and other states. Legislative malapportionment without question is the cause of rural local government looking to the state capital for its wants and urban local government looking to Washington for solution to the urgent problems confronting it.

With the State running county affairs and the federal government engaged in urban and state affairs, state affairs and federal affairs both suffer.

From 1950 to 1960 Federal matching funds to Oklahoma grew 50 per cent faster than Oklahoma's own funds increased.

No major decision can be made today on relief or highway matters without complying with federal rules.

The failure of local government to support urban needs is made further apparent by the introduction of S. 1633 in the United States Senate, creating a new cabinet post

to be known as the Department of Urban Affairs and Housing to handle urban needs. Furthermore, the Senate Government Operations Committee has ordered S. 1633 favorably reported, although said report had not as yet been filed, at last report.

Two out of every three residents of the United States now live in urbanized areas, with half of these urbanites living in suburban regions outside central cities. It is estimated that virtually all population growth of the next two decades will be in suburban portions of metropolitan areas. By 1980, about 75 per cent of the nation's population is expected to live in urbanized areas; the urban population will number about 180 million persons, and, be equivalent to the nation's total 1960 population.[1]

On the local scene Oklahoma gives 40 per cent of its fuel taxes to its 231 County Commissioners. Over 93 per cent of all funds County Commissioners receive for county roads are state taxes. Only the small balance is raised at the local level. By the same token federal funds of a similar amount are used by the State to build intrastate and interstate highways.

Nearly one-half of the nation's motor travel now occurs on city routes that account for only 10 per cent of total highway mileage. This urban travel will more than double over the next two decades, while rural highway travel will increase about 30 per cent. By 1980, about 60 per cent of the anticipated 1,277 billion yearly vehicle

[1] "Future Highways and Urban Growth" prepared by Wilbur Smith and Associates, nationally known traffic engineers, dated February, 1961, under commission from The Automobile Manufacturers Association, pages iii and 200.

miles of travel will be within expanded urban area limits.[2] But county government in Oklahoma receives twelve times as much of our fuel tax as cities and towns, while 70 per cent of our people live in incorporated municipalities.

Distribution of gasoline taxes to our County Commissioners in Oklahoma is enlightening in that it shows a trend directly contrary to traffic growth and obvious need. At first it was divided 40 per cent on population, 30 per cent on area and 30 per cent on road mileage. By evolution the factors have been changed by the Legislature on newer taxes to eliminate all consideration of population in cities of over 5,000 including the first 5,000. Likewise the rural legislature prescribed use of an outdated census in determining population after it was replaced by a new federal census. As cities expand, the county road mileage likewise decreases without any compensating increase in city tax apportionments. Thus the areas with the greatest new needs are actually being penalized for growing.

Our 1959 Legislature decided to give one-third of all alcoholic taxes to cities and towns when it submitted repeal of prohibition (the repeal amendment restricted place of sales to inside cities and towns) on the announced policy that policing problems created would be a municipal responsibility. But our rurally dominated Senate couldn't quit. It wrote in a provision that distribution to the cities and towns be made through County Commissioners with equal consideration given to population and the area of the county. Why a town of 5,000 in a county small in area should receive less than a town of 5,000 in a county large in area is impossible to determine; for that matter, why

[2] "Future Highways and Urban Growth," page v.

area of a county should be a factor in municipal needs defies explanation. As a result per capita benefits are 25 times as great in cities and towns of one county as in another. Is it not significant that the citizens of the favored county have 14 times the vote in House representation and 9⅓ times the Senatorial vote of the unfavored county?

Appellees state at page 32 of their brief that all pay the same tax. It is submitted this is false in Oklahoma and probably in Tennessee. Ad valorem taxes are generally the basis of local government revenues. Appraisals on which they are based vary in Oklahoma from 12.41 per cent of true value in one county to 25.44 per cent in another county according to latest Oklahoma Tax Commission reports. The poorly assessed county has six times the legislative voting strength of the higher assessed county. The same report points out that 61 of our 77 counties are below the state average.

As local revenues decrease state revenues must be stepped up to replace them. Our state school aid program began as aid only for needy areas supplementing any shortage of ad valorem taxes to meet local needs. But as aid began, some choose to rest at the local level and state aid picked up the thus increased need. This created a desire on the part of others to shift the burden to the statehouse. By subtle provisions as to how the aid is to be provided, the net result is that underrepresented areas receive only the residue after requests of overrepresented areas are provided.

Likewise when County Commissioners using state funds can improve rural roads and roads within smaller towns, there is a discrimination in requiring urban areas to pay

special assessments to construct streets or higher water, sewer or other similar charges to operate city government, which includes road maintenance.

Thus an obvious discrimination can and does exist and citizens are not paying the same tax.

At page 37 of their brief Appellees state:

> "If the Court will not exercise equity jurisdiction in a case involving the redistricting of a state for the purpose of electing members of Congress, there is even less reason for the Court to grant relief in a case involving the apportionment of members of a state legislature."

It is submitted this statement is also contrary to fact. The state legislatures have been the guilty parties in congressional redistricting. In Oklahoma, two congressmen each represent more than twice the people that another congressman does. The legislative districts encompassed in the large congressional districts are generally underrepresented, whereas those in the smaller congressional districts are overrepresented substantially.

This problem will be effectively resolved in states with equal legislative representation. So contrary to Appellees' contention there is obviously far more reason for the Court to act on legislative reapportionment than on congressional redistricting. It is far better for the courts to "slay the dragon than only to cut off one of its many heads."

In 1943 the Oklahoma Supreme Court in *Jones* v. *Freeman*, 146 P.2d 564 at 569 said of the 1941 apportionments:

"The condition thus shown to exist is one of grave concern. The principle of equality of representation lies at the very heart of representative government. 18 Am. Jur. 192, §17. This principle was enjoined upon the Legislature by the cited constitutional provision. At the ballot box, in a representative government, each citizen is supposed to be, and should be the equal of every other citizen and all are entitled to approximately an equal vote in the enactment of laws through elected Representatives. It was not the intention of the framers of the Constitution, or of the people who adopted it, that citizens of one county should have representation in the two Houses of the Legislature out of all proportion to that enjoyed by the citizens of other counties, except in the few instances above noted.

"The Kentucky court has well said: 'Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayer is distributed, and the power to make and measure the levy of taxes, are so essential, all inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the very vitals of democracy itself.' Stiglitz v. Schardien, 239 Ky. 799, 40 S. W. 2d 315, 321.

* * * * * * *

" The Kentucky court, in Stiglitz v. Schardien, above, in a case where the inequality was not so great as in

> Oklahoma, used this language, which is pertinent here: 'The inequality is so glaring that it repels any presumption that the legislation constituted a fair approximation of what was required by the fundamental law. It represents an instance where fair-minded men can entertain no doubt that the inequality of representation is grave, unreasonable and unnecessary'."

and at 571:

> "But a citizen has more than the mere right to have his own county or district fully represented in the Legislature. Discrimination may result from giving other counties too much representation as well as from giving a particular county insufficient representation. Each citizen has a right to have the state apportioned in accordance with the provisions of the Constitution, and to be governed by a Legislature which fairly represents the whole body of the electorate, elected as required by the provisions of the Constitution. Stiglitz v. Schardien, above; State v. Wrightson, above."

and at 572:

> "This problem, created by lack of power on the part of the courts to affirmatively enforce constitutional provisions relating to apportionment, has not been confined to Oklahoma alone. Overrepresentation of the less populous areas has been the rule, rather than the exception, among the other states of the Union. And that Legislatures have been traditionally slow to enact apportionment statutes meeting the requirements of State Constitutions is evidenced by the great number of reported cases on the subject. See 2 A.L.R. 1337, note. The overrepresented counties and districts simply do not relinquish the advantage they possess. They fight to retain it."

Unfortunately, in spite of these findings, the Oklahoma Court ruled it didn't have the power to act.

Appellees argue at page 47 of their brief that the Federal Courts of equity will not interfere with the enforcement of state laws except "to prevent irreparable injury which is clear and imminent."

It is submitted that irreparable injury to democracy itself is clear and imminent. When minority rule so distorts our whole governmental structure as to have state government stand mute on such grave local problems as are being defaulted to the federal government, democracy itself is in jeopardy. Problems assigned to the federal government, such as defense and international relations are grave enough alone to command the undivided attention of Congress and the federal government.

It cannot be argued with convincing logic that local government when truly representative cannot handle its own problems better than they can be handled for them by unknown people removed from the scene by from hundreds to several thousands of miles.

But there can be no question that local government is not truly representative. It is in the shackles of malapportionment.

There likewise can be no question that not only does discrimination exist, but that irreparable injury to democracy, representative government and the very moral fiber of our people is clear and imminent.

COURT ACTION CAN AFFORD RELIEF

Oklahoma has a situation very similar to that in Tennessee insofar as legislative apportionment is concerned.

But thanks to the "Tennessee case" coming before this Honorable Court a modicum of relief may have been granted our more populous counties.

Both rural and urban Senators and Representatives repeatedly publicly pressed for reapportionment by the Legislature to "prevent the Federal Courts doing it" throughout the legislative session just completed. The urban legislators asked generally for compliance with their constitutional oath to enforce the Constitution. With significant exceptions others sought to circumvent the clear intent of the Constituion as well as possible Federal Court action by their actions.

The threat of court action, now only on the distant Tennessee horizon, but augmented by a case pending in the United States District Court for the Western District of Oklahoma and a damage suit against legislators and others by citizens residing in the Northern District, caused the first complete apportionment of our Senate since statehood although our Constitution, like that of Tennessee, requires action each ten years after a Federal census.

Unfortunately, the result was clearly unconstitutional and is under attack in the State Supreme Court. However, it did increase the minimum per cent of people who can nominate and elect a majority of our Senate from 23 per cent to 27 per cent. The most flagrant disparity in Senate voting strength was reduced from 33-1 to 11-1.

However, this can hardly be said to comply with the constitutional mandate that senatorial "districts shall contain as near as may be an equal number of inhabitants" (Art. V, Sec. 9(a) Oklahoma Constitution). The minority still rules although as a result of this action, if it stands, it will take a few more people and Senators to compose this ruling minority.

The apportionment plan in Oklahoma's Constitution provides a Senate based on population and a House based partially on area and partially on population.

The new senatorial apportionment, without any constitutional basis whatsoever, added one Senator to a favored rural district. These two Senators representing said district will represent the third and fourth fewest people of any Senator. The seven other Senators added by this act are within constitutional limitations. The failure lies in not consolidating many overrepresented districts and adding the additional Senators to the two larger counties. For example, Oklahoma and Tulsa Counties each nominated and elected one Senator. The act provides for three each. The Constitution would give 8 and 6 respectively. The act provides 52 Senators, the Constitution would give us 54. Thus the politically impossible job of consolidating districts to eliminate six incumbents and rearranging all other districts was avoided, and while constitutionally the two cities could have been given two more Senators without eliminating incumbents the Legislature didn't even afford this less painful relief.

Insofar as the House is concerned the Legislature was last apportioned according to the Constitution in 1921. The

1961 legislative session did two things—shift some six representatives from six overrepresented middle-size counties to six underrepresented middle-size counties and submit a constitutional amendment to special vote on September 12 which legalizes this apportionment and throws a sop of a total of six additional representatives to the two largest counties to attempt to procure votes.

Whereas, under the Constitution a majority of Representatives represent 34 per cent of our population, under the statutory provision 29 per cent would be represented by a majority. The constitutional amendment submitted would, if adopted, cause 31 per cent currently to govern. Without the recent amendment some 26 per cent elected a majority.

Thus this Court action can be credited with causing an improvement in Oklahoma's House representation from 26 to 29 per cent and in the Senate from 23 to 27 per cent. It clearly shows that the retention of jurisdiction is a potential source of relief alone. It may be the spur that will give fair representation throughout the country. It confirms contentions of Appellants and results reached in New Jersey (*Asbury Park Press* v. *Wooley*, 33 N.J. 1, 161 A.2d 705), Minnesota (*Magraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184 and 197 F. Supp. 803) and Hawaii (*Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220).

But conversely it apparently shows that court action must be certain if full relief is to be granted.

INITIATIVE DOES NOT AFFORD EFFECTIVE RELIEF

The initiative is cited as a means of relief in those states having it. *Radford* v. *Gary*, 352 U.S. 991, is distinguished on this basis and in theory this is a sound distinction. As a practical matter it is at most a possible means of relief but extremely impractical.

In the first half of Oklahoma's history some 49 initiative measures reached the voting stage, whereas only 19 have in the last half of our history. Of those 19, only five school measures which were voted upon at two elections held during and immediately after World War II were adopted. In the last 15 years, over one-fourth of the State's history, *none* have succeeded. (Appendix of Title 34, Oklahoma Statutes Annotated.) It is significant that school forces are a tremendously powerful political influence. No other group or groups though, including dry, repeal, municipal, Republican Party, better roads, or reapportionment groups have been successful.

One weakness lies in the inability to amend a petition after it is filed. Various groups favoring the end result don't agree on the means, and instead of joining forces to attain the desired result, as is customary in legislative processes when the time for amendment ends, those that would otherwise be proponents continue to argue.

The other factor which practically neutralizes initiative as a means of relief is the huge job involved now.

The Oklahoma Constitution (Art. V, Sec. 2) has been interpreted to require 15 per cent of those voting at the last general election (November, every other year) to sign

petitions to submit a constitutional amendment. It is recognized that a constitutional amendment which establishes a procedure to enforce the constitutional mandate is requisite to provide reapportionment in Oklahoma. This means the signatures of 135,473 properly registered voters must be signed to a petition, properly attested, gathered together, filed, and finally sustained as to validity to submit a change in our reapportionment procedure.

A complicated system of review of validity of signatures is first imposed on the Secretary of State and then *de novo* on the State Supreme Court, where other legal questions may also be raised. After that a Governor has in effect a veto by refusing to submit an initiated measure at a special election, since such measures voted on at general elections must receive a majority of all votes cast at the election regardless of whether many voters vote only for President, Governor or Sheriff and not on the submitted question. The "silent vote" can thus effectively kill such a measure.

The organizational effort and expense of printing, circulating, gathering, submitting and securing favorable rulings on such measures is tremendous—but probably the most difficult obstacle is the campaign. Whether we like it or not, in our busy lives, political considerations must compete with a myriad of other responsibilities. Executive, legislative and judicial officials seldom "learn the ropes" of their job overnight. Pity the poor citizen asked to understand as complex a problem as reapportionment.

In Oklahoma, he was told it eliminated homestead exemption, reduced pension checks, stopped school buses, eliminated rural road care, abolished a number of county

seats, gave veto power to the two largest cities, helped labor, hurt labor, and a number of other untruths and half-truths.

Then such organizations as the League of Women Voters who had championed reapportionment for years said that the submitted measure which allowed every county a representative was all wrong. The Farm Bureau, while claiming it favored reapportionment wanted to ignore the basic difference between state and federal governments and pattern on the federal plan of Senators for Counties as well as a Representative for every county. Other groups said the plan provided too many legislators, others said it wasn't representative enough.

If he lived in the rural areas he was led to distrust anyone in a city or town. If he lived in a town, he suspicioned anyone in a city, and if he lived in a middle-sized city, he was told falsely that this was just a big city scheme to control all government. Naturally those residing in cities resent the unfair advantage of those in rural areas much as any "have nots" are jealous of the "haves." Division of our people has been one of the unfortunate by-products of legislative malapportionment.

It is obvious that the tug and pull of all the pressure groups, the confusion among the supposed friends of reapportionment and other distractions unfortunately included in the same special election left the poor confused voter with no choice but to follow natural instinct when confused and vote "No."

Almost a year has elapsed since the reapportionment election, and no new petition has been initiated. There

has been much talk, but the argument continues as to the contents of any new petition. Regardless of what the next petition contains many sincere supporters of fair representation will probably oppose it and many selfish interests will distort its purpose and results. The people will again be confused and no relief accomplished.

Our neighboring State of Colorado had two reapportionment petitions initiated although their voting disparity is not nearly as great as in Oklahoma. The first was initiated by the Cattlemen's Association, the second by urban people. Both failed.

Thus, while initiative appears to offer sound relief, as a practical matter it has become progressively more inadequate. Apparently this is caused by the increasing expensiveness of the procedure, the difficulty of explaining increasingly complex proposals, and even more from the lack of compromising and amendatory processes that are such a fundamental part of legislation.

CONCLUSION

The time has passed when the question of reapportionment can be left to our legislatures. The gross discriminations and the legislatures' refusals to comply with constitutional mandates is a blight infecting democracy and distorting governmental functions between the various levels of government. The time has passed when this Court can logically consider this even a discretionary matter in equity. This principle has failed to produce the proper results. This Honorable Court has the power to act. If

truly representative government is to survive, this Honorable Court offers the only apparent hope. This Court is the last resort. It might even be said this Honorable Court is now duty bound to act!

Respectfully submitted,

Applicant and Attorney Pro Se,
J. HOWARD EDMONDSON,
Governor of Oklahoma,
State Capitol,
Oklahoma City, Oklahoma;

NORMAN E. REYNOLDS, JR.,
1101 Republic Building,
Oklahoma City 2, Oklahoma,
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